UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. EDWARD DUBOSE JR., Defendant	)))))))))	Case No.: 4:19 CR 49 JUDGE SOLOMON OLIVER, JR. ORDER

Currently pending before the court in the above-captioned case is Defendant Edward Dubose Jr.'s ("Dubose" or "Defendant") Motion to Suppress the Contents of Any Electronic Surveillance Including But Not Limited to the Fruits of Illegal Wiretaps ("Motion"). (ECF No. 133.) For the reasons stated herein, the court denies Defendant's Motion.

I. BACKGROUND

A. Factual Background

On January 29, 2019, a federal grand jury in the Northern District of Ohio returned a ninety-five (95) count Indictment against Dubose and eleven other defendants. (ECF No. 1.) As relevant here, the Indictment charged Dubose with: conspiracy to possess with the intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846 (Count 1); distribution of crack-cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 4); distribution of crack-cocaine and heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Counts 5 and 11); distribution of crack-cocaine

in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Counts 12 and 14); distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 15); distribution of crack-cocaine and heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 16); distribution of crack-cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Counts 17–18 and 20–23); and use of a communication facility in furtherance of a drug trafficking crime in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2 (Counts 26–46). (*Id.*)

These charges stemmed from information that was gathered during a several-months long investigation regarding Defendant's suspected involvement in drug trafficking in the Youngstown, Ohio, area. (Gov.'t Opp'n at PageID #541, ECF No. 164.) Consistent therewith, the Government applied for and was granted authorization to conduct two separate interceptions ("wiretaps") of Defendant's wire and electronic communications, including but not limited to text messages.[1] (*Id.* at PageID #540; SEALED Gov.'t Exhibits 1, 3, 4, and 6.) Each wiretap application was supported by sworn affidavits made by FBI Task Force Officer Michael J. Sweeney ("TFO Sweeney"). (Gov.'t Opp'n at PageID #541, ECF No. 164; SEALED Gov.'t Exhibits 2 and 5.) In these affidavits, TFO Sweeney outlined that a Confidential Informant (the "CI") identified Defendant as a significant heroin and crack-cocaine dealer, and explained that the CI made eleven separate controlled purchases

[1] On May 5, 2017, U.S. District Court Judge Benita Y. Pearson, of the Northern District of Ohio, authorized the Government to conduct a wiretap of Defendant's wire and electronic communications for a period of thirty days. (Gov.'t Opp'n at PageID #540, ECF No. 164; SEALED Gov.'t Exhibit 3.)

Thereafter, on June 14, 2017, U.S. District Court Judge Sara Lioi, of the Northern District of Ohio, authorized the interception of Defendant's wire and electronic communications for an additional thirty days. (Gov.'t Opp'n at PageID #541, ECF No. 164; SEALED Gov.'t Exhibit 6.)

of crack-cocaine and heroin from Defendant between July 27, 2016, and May 9, 2017 at various locations in the Youngstown, Ohio, area. (Gov.'t Opp'n at PageID #542–46, ECF No. 164; SEALED Gov.'t Exhibit 2, Affidavit ¶¶ 25, 31–40; SEALED Gov.'t Exhibit 5, Affidavit ¶¶ 26, 31–39.)

B. Procedural History

On August 27, 2019, Defendant filed the Motion considered herein, requesting the court to suppress and prohibit the Government "from introducing into evidence at trial any and all intercepted wire and oral communications obtained by unlawful electronic surveillance" of Defendant. (Mot. to Suppress at PageID #379, ECF No. 133.) As grounds for relief, Defendant argues that the wiretaps (1) were based on material misstatements and omissions, (2) lacked probable cause, (3) lacked a sufficient showing of necessity, and (4) were not made in conformity with the order of authorization because they were not properly minimized as required by law. (*Id.* at PageID #378.) Further, Defendant moves for suppression on the ground that "he did not receive the mandatory notice of the interceptions as required by law." (*Id.*) Alternatively, Defendant requests the court to conduct a *Franks* Hearing. (*Id.*) The Government filed its Opposition on October 15, 2019. (ECF No. 164.) In short, the Government maintains that suppression is not appropriate based on any of Defendant's assertions and that Defendant has not met his burden of showing that he is entitled to a *Franks* Hearing. (Gov.'t Opp'n at PageID #547, ECF No. 164.)

II. LAW AND ANALYSIS

A. Arguments of the Parties

Defendant asserts that the affidavits used to support the Government's applications for its wiretaps "established beyond any doubt that normal investigative procedures worked quite well

enough to accomplish every purpose lawfully open to investigative agents." (Mot. to Suppress at PageID #384, ECF No. 133.) Defendant also maintains that the affidavits "contained material misstatements and omissions regarding the purported necessity for the requested wiretaps as to the reliability and veracity of confidential sources." (*Id.*) Additionally, Defendant argues that the affidavits contained boilerplate assertions about investigative procedures, which lacked "any basis in reality and fail[ed] to demonstrate that normal investigative techniques were unlikely to succeed or too dangerous to pursue." (*Id.*) Defendant asserts that, collectively, these facts show that the Government failed to establish necessity for the wiretaps as required by § 2518(3)(c). Further, Defendant asserts that the "type of interception utilized by the Government in this case went beyond the scope of the [wiretap] application[s]." (*Id.* at PageID #386.) Finally, Defendant argues that the wiretap interceptions are void because they failed to contain "a particular description of the type of communications sought to be intercepted." (*Id.*)

The Government counters that suppression is not appropriate based on Defendant's assertions and that Defendant is not entitled to a *Franks* Hearing largely because he failed to substantiate his arguments with supporting facts, explanation, or relevant case law. (Gov.'t Opp'n at PageID #547, ECF No. 164.) As discussed below, the Government argues that Defendant is not entitled to a *Franks* Hearing because he has not made the required substantial preliminary showing regarding what portions of the wiretap applications were false. (*Id.* at PageID #548–49.) Second, the Government argues that there were enough facts before the court to determine that there was probable cause to believe Defendant committed a crime—the eleven controlled purchases of heroin and crack-cocaine the CI made from Defendant and Defendant's intercepted phone calls in which he spoke about drug trafficking. (*Id.* at PageID #550.) Third, the Government maintains that Defendant's challenge to the

necessity of the two wiretaps is meritless because TFO Sweeney thoroughly explained the investigative techniques that were used to gather information, why those techniques were ineffective, and why the wiretaps were necessary to identify all participants in the drug trafficking organization. (*Id.* at PageID #552–60.) Fourth, the Government argues that Defendant received notice of the interceptions via the Indictment and discovery. (*Id.* at PageID #560.) Alternatively, the Government argues that even if there was a violation based on the timeliness of the notice that Defendant received, suppression still is not appropriate because Defendant suffered no actual prejudice from the delay. (*Id.* at PageID #560–61.) Fifth, the Government maintains that minimization was proper and that the agents monitoring Defendant's phone calls were fully instructed on the types of calls that could be listened to and those that could not. (*Id.* at PageID #562.) Additionally, the Government maintains that Judge Pearson and Lioi both supervised the Government's monitoring and that its monitoring was limited to calls that were determined to be criminal in nature. (*Id.*) Finally, the Government asserts that the descriptions of the type of communications to be intercepted were sufficient. (*Id.* at PageID #547.)

B. The Court's Analysis

1. Whether Suppression is Appropriate

Under Title III, "[i]n order to conduct electronic surveillance using a wiretap, federal law enforcement officials must secure authorization by making an application containing 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'" *United States v. Young*, 847 F.3d 328, 343 (6th Cir. 2017) (citing 18 U.S.C. § 2518(1)(c)). This requirement "was designed to insure that wiretapping is not resorted to in a situation where traditional investigative

techniques 'would suffice to expose the crime.'" *Id.* (internal citation and quotation marks omitted). To satisfy this requirement, the party seeking the wiretap must show that the wiretap "is not being routinely employed as the initial step in [the] criminal investigation." *Id.* District courts have "considerable discretion" in determining whether the requirements of § 2518(1)(c) are met in order to authorize a wiretap interception. *Id.*

In his Motion, Defendant generally cites Fourth Amendment jurisprudence and the governing law regarding wiretap applications. But Defendant does not explain why there was no probable cause to support the wiretaps, what material misstatements or omissions were made in the affidavits supporting the wiretap applications, how the wiretap applications lacked a sufficient showing of necessity, or how the wiretaps were not properly minimized as required by law. As discussed more fully below, his bare bones assertions, without more, are insufficient to warrant suppression. *See generally Young*, 847 F.3d at 342 (finding the defendant waived his right to challenge the denial of his motion to suppress because he "merely cite[d] to the governing rules and relevant case law on Fourth Amendment jurisprudence and wiretap applications, without citations to the record explaining why there was no probable cause"). In any event, all of the grounds upon which Defendant has based his request for suppression are meritless.

A. Material Misstatements and Omissions

First, Defendant contends that the wiretaps were based on material misstatements and omissions. (Mot. to Suppress at PageID #378, ECF No. 133.) However, Defendant fails to identify what facts described in the TFO Sweeney's affidavits were false, or otherwise misstated, or what information was omitted from the affidavits. In the absence of facts to substantiate his claim, the court cannot find that there were any misstatements or omissions. *See United States v. Bennett*, 905

F.2d 931, 934 (6th Cir. 1990) (noting that in order to successfully challenge the veracity of statements in an affidavit that formed the basis for a warrant, the defendant's allegations "must be more than conclusory" and must be accompanied "with an offer of proof[,]" and the defendant must provide "supporting affidavits or explain their absence").

B. Probable Cause

Second, contrary to Defendant's assertion, there were enough facts within the affidavits underlying the wiretap applications to establish probable cause that Defendant was engaged in drug trafficking and that the wiretaps would lead to evidence identifying the participants of the drug trafficking organization. As the Sixth Circuit has stated, "certainty is not required" for a judge to make a probable cause determination. *United States v. Alfano*, 838 F.2d 158, 162 (6th Cir. 1988). Instead, there need only be "a fair probability, but more than a 'mere suspicion," that evidence of a crime will be discovered. *Id.* (internal quotation marks omitted). Furthermore, because "the issuing judge is in the best position to determine all of the circumstances in the light in which they may appear at the time, 'great deference' is normally paid to the determination of an issuing judge." *Id.* Ten of the controlled purchase incidents were outlined in the first wiretap application; and all eleven controlled purchase incidents, along with intercepted communications from Defendant's phone calls in which he spoke about drug trafficking, were outlined in the second wiretap application. (Gov.'t Opp'n at PageID #550, ECF No. 164; SEALED Gov.'t Exhibit 2, Affidavit ¶¶ 31–40; SEALED Gov.'t Exhibit 5, Affidavit ¶¶ 31–45.) Together, this information, along with TFO Sweeney's account that he participated in the investigation of Defendant and was familiar with the facts and circumstances of the investigation, were sufficient to establish probable cause. (*See* SEALED Gov.'t Exhibit 2, Affidavit ¶ 20; SEALED Gov.'t Exhibit 5, Affidavit ¶ 21.)

C. Necessity for Wiretaps

Third, the Government met its burden of demonstrating necessity for the wiretaps. In this Circuit, the Government "is not required to prove that every other conceivable method has been tried and failed or that all avenues of investigation have been exhausted." *Alfano*, 838 F.2d at 163. To the contrary, "[a]ll that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate." *Young*, 847 F.3d at 344 (citing *Alfano*, 838 F.2d at 163–64)). That is precisely what the Government did. Indeed, TFO Sweeney devoted a significant portion of his affidavits to explaining other investigative techniques and why those techniques would be inadequate to accomplish the goal of identifying all of the participants in the drug trafficking organization. Specifically, TFO Sweeney informed the court that investigators gave serious consideration to the use of confidential informants, witness interviews, grand jury investigation, physical and fixed surveillance, trash searches, toll records, pen registers and caller ID, law enforcement records, search warrants, consensual recordings, undercover investigations, and cell-site and mobile tracking devices. (Gov.'t Opp'n at PageID #552–60, ECF No. 164; SEALED Gov.'t Exhibit 2, Affidavit ¶¶ 47–104; SEALED Gov.'t Exhibit 5, Affidavit ¶¶ 53–118.) Though these alternatives were available to investigators, TFO Sweeney thoroughly outlined their limitations and the need for the wiretaps to uncover the full scope of the conspiracy, including the identities of the participants and the roles they played in the drug trafficking organization. (SEALED Gov.'t Exhibit 2, Affidavit ¶¶ 47–104; SEALED Gov.'t Exhibit 5, Affidavit ¶¶ 53–118.) Thus, the court finds that the Government demonstrated necessity for the wiretaps. Defendant's argument to the contrary is without merit.

D. Minimization

Next, without explanation or supporting facts, Defendant argues that the wiretaps were not properly minimized as required by law. (Mot. to Suppress at PageID #378, ECF No. 133.) Section 2518(5) provides that wiretap interceptions must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). However, the "statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *United States v. Jenkins*, 659 F. App'x 327, 336 (6th Cir. 2016) (quoting *Scotts v. United States*, 436 U.S. 128, 140 (1978)). In order to evaluate compliance with the minimization requirement, the court must "objectively assess the reasonableness of the monitoring agents' actions in light of the facts and circumstances confronting them at the time." *Jenkins*, 659 F. App'x at 336 (internal citation and quotation marks omitted). Defendants must do more than "identify particular calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap." *Id.* (quoting *United States v. Lawson*, 780 F.2d 535, 540 (6th Cir. 1985)). Further, defendants must "demonstrate that the monitoring agents exhibited a high disregard for [their] privacy rights or that they did not do all they reasonably could to avoid unnecessary intrusions." *Jenkins*, 659 F. App'x at 336.

Here, Defendant has not established a pattern of interception of innocent phone calls and has not demonstrated that the investigators had a high disregard for his privacy rights. The record reflects that the investigators were all informed of the procedures for minimization and only monitored calls that were determined to be criminal in nature. Moreover, Judge Pearson and Lioi both supervised

the monitoring of the respective wiretaps at the midpoint and end of the thirty-day monitoring periods. Therefore, Defendant has failed to establish that the Government violated § 2518(5).

E. Proper Notice

Fifth, without citing the relevant law, Defendant argues that the Government failed to provide him with notice of the wiretaps. (Mot. to Suppress at PageID #378, ECF No. 133.) Title III "requires notice to be served upon people named in an application within ninety days after surveillance ceases, including the fact of the entry of the order or application, the date that surveillance was authorized, and the [sic] whether communications were intercepted." *United States v. Gray*, 372 F. Supp. 2d 1025, 1047 (N.D. Ohio 2005) (citing 18 U.S.C. § 2518(8)(d)). However, "a post-interception failure to serve the notice and inventory cannot result in retroactively rendering the interception unlawful." *Gray*, 372 F. Supp. 2d at 1047 (citing *United States v. Donovan*, 429 U.S. 413, 439 (1977)). Thus, a wiretap interception is not rendered unlawful based on the lack of notice—instead, the interception may be suppressed if the defendant can show actual prejudice arising from the government's failure to provide timely notice. *Gray*, F. Supp. 2d at 1047 ("[e]ven if notice was not given until after the ninety-day deadline, suppression is not required unless the defendant shows actual prejudice arising from the delay"). Courts will not presume or infer that a defendant has suffered prejudice from the length of the time lapse involved. *Id.* Further, postponing service is permissible where the Government has established a need to continue the investigation. *Id.*

Because the wiretap interceptions were authorized on May 5, 2017 and June 14, 2017 for thirty-day periods, the Government was required to provide Defendant with notice of the interceptions on or before September 5, 2017 and October 14, 2017, respectively. The Government neither argues that timely notice was provided to Defendant nor that the required ninety-day notice

period was postponed based on its need to continue the investigation. To the contrary, the Government asserts that Defendant received sufficient notice via the Indictment (in January of 2019) and through the discovery process. (Gov.'t Opp'n at PageID #560, ECF No. 164.) Such notice, more than a year after the required service date, does not comply with Title III's requirements. Furthermore, it is disturbing that notice was delayed for so long with no apparent explanation by the Government. However, Dubose has produced no evidence to establish any prejudice to him as a result of the delayed notice. *See, e.g.*, *Donovan*, 429 U.S. at 439 n.26 (finding two defendants suffered no prejudice from the government's failure to provide timely notice of its wiretap interceptions because the defendants received the intercept orders, applications, and related papers shortly after the indictment was filed (a little less than a year after the interceptions had ceased), and received transcripts of the intercepted conversations from the government in response to pretrial discovery motions); *see also United States v. Barletta*, 565 F.2d 985, 989–92 (8th Cir. 1977) (finding suppression of the government's wiretap interceptions was not required because defendants failed to show prejudice despite having received no notice until nearly two years after the wiretap interceptions came to an end). Thus, in the absence of a showing of prejudice by Defendant, suppression is not warranted. *See, e.g.*, *Poore v. State*, 384 A.2d 103, 114 (Md. Ct. Spec. App. 1978) (finding "[o]nly the failure of the appellant to demonstrate prejudice st[ood] between the admission of the evidence and its suppression" where the government failed to provide timely notice of the wiretap interception).

F. Particularity

Lastly, Defendant asserts that the wiretap applications failed to contain "a particular description of the type of communications sought to be intercepted" as required by § 2518(1)(b)(iii).

(Mot. to Suppress at PageID #386, ECF No. 133.) However, this assertion is completely wrong. In this Circuit, the Government may satisfy the requirements of § 2518(1)(b)(iii) by describing the communications to be intercepted in terms of the suspected offense. *United States v. Giacalone*, 853 F.2d 470, 481 (6th Cir. 1988). Thus,

> [a]lthough the nature and type of the anticipated conversations must be described, the actual content need not and cannot be stated since the conversations have not yet taken place at the time the application is made and it is virtually impossible for an applicant to predict exactly what will be said concerning a specific crime. The order must be broad enough to allow interception of any statements concerning a specified pattern of crime.

Id. (internal citations and quotations omitted).

That is precisely what the Government sought. Indeed, the wiretap applications provided that the Government would be intercepting communications pertaining to the suspected heroin and crack-cocaine trafficking offenses that would reveal:

> (1) the manner, scope and extent that the telephone [wa]s utilized to facilitate the possession with intent to distribute and the distribution of controlled substances; that is, cocaine; (2) information regarding the precise nature and scope of illegal activities, including financing, managing, supervising, directing, dissemination of orders and instructions to subordinates, distribution and possession of controlled substances, methods of payments and other conversations relating to the administration, control and management of the aforesaid illegal narcotics business; (3) information regarding the identity of the participants, aiders and abettors, and the roles of each participant in the conspiracy and in the substantive violations of the aforesaid controlled substance statutes; (4) information regarding the locations, sources, methods and times of distribution of the controlled substances and the disposition of the monies obtained as a result of these illegal activities; and (5) information regarding the transportation and laundering of drug proceeds. In addition, the communications are expected to constitute admissible evidence of the commission of the aforementioned offenses[.]

(SEALED Gov.'t Exhibit 1, App. ¶ 4; SEALED Gov.'t Exhibit 4, App. ¶ 4.) Moreover, the court's orders authorizing the wiretaps reiterated that above-described communications would be intercepted. (SEALED Gov.'t Exhibit 3, Order ¶ 2; SEALED Gov.'t Exhibit 6, Order ¶ 2.) Furthermore, Defendant has cited no authority which would indicate that the Government's descriptions were insufficient. Accordingly, the alleged lack of particularity does not support suppression.

In sum, Defendant has failed to articulate any facts that would support a finding that the Government violated Title III in its wiretap applications or that the Government's failure to provide him with timely notice of the interceptions resulted in prejudice. Therefore, the court denies Defendant's request for an order suppressing the wiretaps.

2. Whether a *Franks* Hearing is Necessary

In *Franks v. Delaware*, 438 U.S. 154, 155 (1978), the Supreme Court established the standard by which a defendant may "challenge the veracity of a sworn statement used by police to procure a search warrant." Under *Franks*, an evidentiary hearing ("*Franks* Hearing") must be held at the defendant's request where: (1) "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit"; and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155–56. Mere "[a]llegations of negligence or innocent mistake are insufficient. *Id.* at 171.

The Sixth Circuit "has repeatedly held that there is a higher bar for obtaining a *Franks* Hearing on the basis of an allegedly material omission as opposed to an allegedly false affirmative statement." *United States v. Fowler*, 535 F.3d 408, 415 (6th Cir. 2008). Specifically, the Sixth

Circuit has stated that "except in the very rare case where the defendant makes a strong preliminary showing that the affiant *with an intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, *Franks* is inapplicable to the omission of disputed facts." *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998) (emphasis in original). In other words, the defendant is entitled to a hearing in such a situation

> if and only if: (1) the defendant makes a substantial preliminary showing that the affiant engaged in deliberate falsehood or reckless disregard for the truth in omitting information from the affidavit, and (2) a finding of probable cause would not be supported by the affidavit if the omitted material were considered to be a part of it.

Fowler, 535 F.3d at 415.

In determining probable cause, the court looks at the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It does not require certainty or a *prima facie* showing of a crime, but only "a fair probability on which reasonable and prudent people, not legal technicians, act." *Florida v. Harris*, 568 U.S. 237, 244 (2013) (internal quotation marks omitted). Probable cause "does not require that every contrary hypothesis be excluded" but it does require more than "mere suspicion." *Alfano*, 838 F.2d at 162.

In his Motion, Defendant neither articulated any facts that would undermine the veracity of statements made in the affidavits nor made a strong preliminary showing, or any showing for that matter, that there were material falsehoods or omissions in the affidavits. Additionally, Defendant has not explained what false statements were made and how, if at all, those statements contributed to the probable cause determination. Therefore, Defendant has not met his heavy burden, and a *Franks* Hearing is not warranted. *See, e.g.*, *Young*, 847 F.3d at 349 (finding the district court did not err in denying the defendant's request for a *Franks* Hearing because the defendant "presented

nothing more than an *allegation*" and failed "to put forth a strong preliminary showing that" the affiant "intended to mislead and exclude information from the affidavit").

III. CONCLUSION

For the foregoing reasons, the court denies Defendant Edward Dubose Jr.'s Motion to Suppress the Contents of Any Electronic Surveillance Including But Not Limited to the Fruits of Illegal Wiretaps. (ECF No. 133.)

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*
UNITED STATES DISTRICT JUDGE

December 4, 2019